No. 131.

Supreme Court of the United States

October Term, 1900.

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THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, EX REL. THE RAILROAD AND WAREHOUSE COMMISSION, DEFENDANT IN ERROR.

In Error to the Supreme Court of Minnesota.

BRIEF FOR DEFENDANT IN ERROR.

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Of Counsel.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

NO. 381.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

Plaintiff in Error,

vs.

STATE OF MINNESOTA ex. rel THE RAILROAD AND WAREHOUSE COMMISSION,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

The St. Paul & Duluth Railroad Company, now controlled and owned by the Northern Pacific Railway Company, operates a line of railroad from Duluth, Minnesota, to the City of St. Paul and the City of Minneapolis, in the State of Minnesota.

The Minneapolis & St. Louis Railroad Company operates a line of road from the cities of St. Paul and Minneapolis to the various points in the State of Minnesota described in the order of the Railroad and Warehouse Commission, which is under consideration in this case.

Both of the defendants are fully equipped to conduct the business of common carriers of freight, have complete track connections and transfer facilities at the cities of St. Paul and Minneapolis, and for a long time prior to the making of the order complained of, had been engaged in transporting hard coal in car load lots without change of cars from Duluth to the points upon the line of the Minneapolis & St. Louis Railroad named, for a joint through rate which had been established by the mutual agreement of said companies, and which had been divided between the companies according to that agreement.

On the 22nd day of September, 1898, the Railroad and Warehouse Commission of the State of Minnesota, under the resolution, Exhibit A, page 16 of Record, entered upon the investigation of the reasonableness of said joint rate for hard coal in car load lots so maintained by said companies. The railway companies duly appeared and took part in the investigation, and on the 19th day of January, 1899, the Commission made the order, Exhibit B, Record page 18, of which Schedules A and B, pages 18 and 19 are a part, Schedule A being the joint through rate which had been established and maintained by the mutual agreement of the railway companies, and Schedule B the rate determined upon by the Commission. The order was duly published and served as required by the laws of Minnesota, but the railway companies failed to agree upon a division of the rate ordered by the Commission, and the plaintiff in error, the Minneapolis & St. Louis Railroad Company, withdrew all tariffs on hard coal in car load lots which had been established by the agreement of said companies. The Commission having duly cited the companies to appear, made the order of April 8th, 1899, directing how the joint through rate which it had established should be divided between the companies. Exhibit C, Record page 20. The orders of the Commission were duly promulgated and published as provided by law.

Neither of the companies filed or posted schedules of the new tariff, as required by the laws of Minnesota, and the plaintiff in error refused to receive or transport coal under the order of the Commission, and thereupon proceedings were commenced in the District Court of Ramsey County, Minne-

sota, to compel the railway companies to comply with the order of the Commission. After trial, judgment was rendered by that court confirming the orders of the Commission and directing the issuance of a peremptory writ of mandamus as prayed for in the petition, and the judgment so entered was affirmed on appeal by the supreme court of Minnesota in State ex rel. vs. The Minneapolis & St. Louis Railway Company, 80 Minn. 191.

ARGUMENT.

If we correctly understand the contention of the plaintiff in error, it is that the judgment of the supreme court of Minnesota is erroneous for two reasons:

First:—That Chapter 91, laws of Minnesota 1895, which confers upon the Railroad and Warehouse Commission of Minnesota the right to compel connecting railroads to establish joint through rates between points within this State, is invalid in that it authorizes an unwarranted interference by the State in the management of railways; and

Second:—That the rate established does not afford sufficient compensation to the carrier within the decisions of this court.

The assignments of error, we think, amount to the two propositions we have stated, most of them being repetitions of the same claim in somewhat different language.

I.

CHAPTER 91, LAWS OF MINNESOTA, 1895, VIOLATES NO PROVISIONS OF THE STATE OR FEDERAL CONSTITUTION, AND UNDER IT THE RAILROAD AND WAREHOUSE COMMISSION OF MINNESOTA HAS THE POWER TO COMPEL THE ESTABLISHMENT AND ACCEPTANCE OF JOINT THROUGH RATES BETWEEN POINTS WITHIN THE STATE BY CONNECTING CARRIERS.

The decisions of this court cited in the brief of counsel for the appellant fully establish the rule contended for by the State, and while it is perhaps impossible to frame any general statement which will cover all cases, we think we are within the scope of all the decisions of our courts upon this

question, both State and Federal, when we say that a railroad corporation and public carrier being an entity, the private property of which has been invested in a public enterprise with the permission of the State and fulfilling a governmental duty or at least power, i. e., the maintenance of a public highway, has the right to receive fair compensation for its services and a fair return upon the capital so invested, and has the right ordinarily to manage its own affairs in its own manner, but with this important limitation,—that where such carrier attempts to unnecessarily increase the cost of the services it renders, or where it, for no apparent good reason, refuses to take proper steps to lessen the cost of the services rendered, the State has the right to interfere with what might be called the private management of the carrier, to an extent sufficient to remedy the abuse; and that it is not only the right but the duty of the State to so regulate the rates, charges and methods of the carrier that for such reasonable compensation the public shall have a safe, efficient and economical service.

Munn vs. Illinois, 94 U. S. 113;
Peik vs. Railroad Company, 94 U. S. 164;
Dowe vs. Beidelman, 125 U. S. 680;
State vs. Farmers' Loan and Trust Co., 116 U. S. 307;
Smythe vs. Ames, 169 U. S. 466; on reargument, 171 U. S. 364;
Railway Company vs. Minnesota, 134 U. S. 418;
Steenerson vs. Railway Company, 69 Minn. 370.

The State has the right to regulate and control the use of private property which has been clothed with a public interest. The only question which arises in this case is to what extent may such control be exercised.

The carrier has undoubtedly the right to manage its own affairs without interference from the State in all matters which are properly private or which affect only its stockholders; those being matters in which the public has no concern, and the relative rights of the stockholders, the officers and corporation can be determined between themselves; but if a carrier deliberately increases the cost of the service it renders to the public, or if it refuses to adopt methods which are obviously expedient and proper, and which will result in

lessening the cost of the service, the State has the right to insist that an economical method shall be adopted, and obviously so when such method is entirely feasible and the usual and ordinary method adopted by railways similarly situated.

Unless this is true, the right of the State to regulate charges is of no efficacy; for when it is considered that the carrier has a right to fair and reasonable compensation for the services, and after the payment of its expenses, to at least some return upon the capital invested, it is apparent that if the management, method of operation, propriety of the various expenses incurred, is beyond State control, the regulation of charges must necessarily be also.

The contrary, however, is the rule, and the authorities cited by counsel for the plaintiff in error, as well as those referred to in this brief, fully establish the rule we contend for,—that the State has the right, within proper limitations, to interfere in and direct methods of operation.

As was said in Smythe vs. Ames, supra, at page 544, "It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders."

If, on a hearing to fix rates, it was shown that the operating expenses were doubled by evident reckless or bad management, the amount so expended would not be accepted as a fair basis upon which to estimate rates, nor would interest paid upon a fraudulent bond issue be considered a legitimate expense; neither would a railroad company be held to have the right to earn dividends upon capitalization shown to be fictitious or grossly excessive. And this is true because the railroad would not be permitted to improperly increase the necessary expenses of conducting the enterprise or to demand from the public earnings upon fictitious capital. What the State can do indirectly it can do directly; and

when connecting carriers are found whose lines constitute a continuous highway for the carrying of a commodity which is necessary to the public and in which the public is deeply interested, it is the duty of both to adjust matters under all the circumstances of the case so as to give the public reasonable service for reasonable compensation.

That joint through rates are advantageous, convenient and economical is proved by the fact that joint traffic arrangements are universally made, and joint through rates universally established. It is only when the public asks to share in the benefits of the situation and the circumstances of the haul that the claim of unwarranted interference is made.

If coal can be carried in car load lots more cheaply, more expeditiously, more conveniently to the public, by joint traffic agreements without change of cars, the State has the right to require that to be done. The duty of the carrier is to serve the public, not to hamper it. It is entitled to a fair compensation for its necessary services under the actual existing conditions and with proper management, and not under expensive conditions which the carrier chooses to create.

The evidence shows that the location of the Duluth road and the Minneapolis & St. Louis road, their track connections, transfer facilities, equipment, etc., are such that by operating together under joint traffic agreements, the cost of the service can be greatly lessened. It is difficult to understand upon what theory the plaintiff in error claims that it has the right to refuse to take advantage of conditions as they actually exist, and to insist that it may, if it so chooses, make the service unnecessarily expensive to the public.

We submit that it is the duty of the common carrier to take advantage of every favorable condition, so as to give the public the benefit of just as economical a service as is possible, and where it refuses so to do, the State has the right, by proper legislative enactment, to compel it.

Mayor, etc., vs. Northwestern Ry., 109 Mass. 112.

If it is conceded, as we think it must be, that the evidence shows that the cost of the service would be less if performed as ordered by the commission, and that no objection to such

method is urged except that the orders constitute an attempt to improperly interfere with the management of the railroad, the question is squarely presented whether or not a common carrier has the right at its pleasure to increase the cost of a service which it renders to the public. If this contention of the plaintiff in error can be maintained, it is idle for the State to attempt to regulate charges. For if it is to have any voice in the establishment of reasonable rates, it must have the power of regulation in some degree and in some manner in the business of the carrier. And it is difficult to see where a stronger case demanding state regulation could be found than the case at bar.

Since the rendition of the judgment in this case by the Supreme Court of Minnesota, this court has, we think, disposed of the contention of counsel for plaintiff in error upon this branch of the case:

> Wisconsin, Minnesota & Pacific Railroad vs. Jacobson, 179 U. S. 287.

The particular question involved here, it is true, did not arise in that case. The same enactment of the Legislature of Minnesota was, however, under consideration, and while this court did not consider any of the provisions of that act which were not involved in the case directly before it, it is submitted that the decision is decisive of this branch of the present case. Mr. Justice Peckham says, at page 296: "At common law the courts would be without power to make such an order as was made in this case by the State court. Legislative authority would be necessary in order to give power to the courts to render a judgment of this kind. If power were granted by the legislature, and it amounted in the particular case to a fair, reasonable and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it. Atchison, etc., Railroad Company vs. Denver, etc., Railroad Company, 110 U. S. 667, 681; People ex rel., etc., vs. Boston & Albany Railroad Company, 70 N. Y. 569; People vs. Railroad Company, 104 N. Y. 58." And again: "Railroads have

from the very outset been regarded as public highways, and the right and the duty of the government to regulate in a reasonable and proper manner the conduct and business of railroad corporations have been founded upon that fact. Constituting public highways of a most important character, the function of proper regulation by the government springs from the fact that in relation to all highways the duty of regulation is governmental in its nature. At the present day there is no denial of these propositions. Olcott vs. Supervisors, 16 Wall. 678; Cherokee Nation vs. Southern Kansas Railway Company, 135 U. S. 641; United States vs. Joint Traffic Association 171 id. 505; Lake Shore Railway Company vs. Ohio, 173 id. 285, 301."

In the case of Louisville & Nashville Railroad Co. vs. Kentucky, 161 U. S. 677, Mr. Justice Brown, speaking of the right of the State to regulate within proper limitations, corporations of this character, after reviewing a multitude of decisions, says, at page 700: "These cases, however, do not infringe upon the general principle, so frequently declared, that where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained wherever it can be done without the impairment of vested rights. Notwithstanding these cases, the general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."

As was said by this Court in Wisconsin, etc., vs. Jacobson, supra: "The only question arising as each case comes up for decision is whether in the particular case the power has been duly exercised."

When it is remembered that the two railway companies who are parties to this agreement had actually entered into a joint traffic agreement and had established joint through rates and had made complete track connections so that they were fully equipped to conduct business in that manner, and that the only demand made by the State, in this proceeding, at

least, is that they will continue the carriage of hard coal in car load lots, but charge therefor no more than the service is reasonably worth, it is apparent how far-fetched is the claim that the State is attempting to improperly interfere in the business of the carrier.

The State has the right to regulate rates in all cases where the carriers and the freight are subject to its jurisdiction. The fact that more than one carrier is engaged in rendering the service cannot of itself deprive the State of this right to regulate, and yet that is what the contention of the plaintiff in error amounts to.

As we will show hereafter, the establishment of a joint through rate, which is less than the sum of the two locals, is not discrimination. Counsel for the plaintiff in error claims that it is, and for that reason the orders of the Commission are void. If this contention were true, the joint rates previously established by agreement between the companies constituted discrimination. But it is claimed that the joint rate so established was beyond the regulation of the State; therefore, by the making of an agreement which was unlawful, because it discriminated between different classes of shippers, the railway companies have secured themselves from interference by the State.

Absurd as this argument is, it has, we submit, as much force as the claim made by the plaintiff in error, that the act of the Legislature and the order of the Commission compel unlawful discrimination, because under them the plaintiff in error is compelled to carry freight originating upon the line of the St. Paul & Duluth Railroad Company upon different terms than freight of the same class originating upon its own or other lines.

The freight affected by the judgment here under consideration is only hard coal in car load lots. When it originates upon the line of the St. Paul & Duluth Railroad Company and is delivered at St. Paul or Minneapolis to the Minneapolis & St. Louis Railway Company, it constitutes freight of a particular class, and the public are each and all entitled to have that freight carried at the rate established, and the benefits of the reduced rate are therefore open to all without discrimination. The discrimination is in the class or character

of the freight carried, and that it can be carried profitably at the rate provided for in the order of the Commission, will, we think, be established in another portion of this brief.

The contention of the plaintiff in error, that the provisions of Chapter 91 of the laws of Minnesota, 1895, are in violation of the charter rights of the plaintiff in error, is not sustained by the authorities cited in counsel's brief. Those decisions are to the effect that in the absence of statutory regulations the courts cannot compel connecting carriers to enter into joint traffic agreements, and that the making of such a regulation is a legislative and not a judicial act.

The decision by Mr. Justice Caldwell in Little Rock & M. R. Co. vs. St. Louis, I. M. & S. Ry. Co. et al., 41 Fed. 559, was based upon the decision of this Court in the Express Cases. 117 U. S. 1; and the following language of this Court, found upon page 29, was quoted by Justice Caldwell: "'In this way, as it seems to us, the Court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves,' and that, we said in Atchison, T. & S. F. R. Co. vs. Denver & N. O. R. Co., 110 U. S. 667, followed at this term in Pullman's Palace Car Co. vs. Missouri Pac. Ry. Co., 115 U. S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt."

In the Express Cases, supra, Mr. Justice Field, in dissenting, uses the following language, page 34: "But I am clear that railroad companies are bound as common carriers to accommodate the public in transportation of goods according to its necessities, and through the instrumentalities or in the mode best adapted to promote its convenience."

It is not necessary in this case to determine what would be the result if the State were attempting to impose a new and different method of business upon the carriers. Here the State simply accepted the method which had already been adopted by the carriers and fixed their charges for such services under the circumstances and conditions and methods of carrying on the business as they existed.

The real question, therefore, in this case is, Have the carriers the right to increase the cost of the service and render it more expensive than necessary? For it is not pretended that if they were permitted to fix their own charges they would not, as a matter of economy, continue to adopt the method now insisted upon by the State. The rates fixed, provide, as we claim, adequate compensation for the services to be rendered. If this is true, it makes no difference whether part of those services consists in transferring of cars or in loading or unloading the merchandise at the connecting point. The services can be profitably rendered at the rate fixed by the Commission. If tne carriers see fit to increase the cost to themselves by unnecessarily handling the freight carried, that is a matter for which the public is not responsible, nor should it be compelled to pay for unnecessary service.

Counsel is in error when it is claimed that the order discriminates between local and through rates. The order under consideration does not approve or disapprove of the local rates maintained by the carriers. It deals exclusively with the through rate; and in the division of the rate there is allowed to the plaintiff in error an amount per ton per mile much greater than the local rate upon the Duluth railroad, which counsel erroneously states was approved of by the Commission. The adoption of that rate by the Commission as a basis for calculating through rates does not constitute an approval of it. And as no appeal has been taken by the St. Paul and Duluth Railroad the plaintiff in error will not be heard to complain that the joint rate established and the division made is unfair as to the Duluth road.

It is true that it has been held that the Interstate Commerce Commission has no authority to compel the establishment of joint rates under the Interstate Commerce Act, and that such right does not exist at common law. That is not the question here; here the right is given by the statute, and the question is as to the validity of the act of the Legislature.

The Interstate Commerce Act contains a provision that where connecting carriers voluntarily enter into joint traffic arrangements, that such joint rate must be reasonable. These

provisions give the Interstate Commerce Commission jurisdiction as to such joint rates.

Railroad vs. Interstate Commerce Commission, 162 U. S. 184.

It is difficult to see any difference in principle between this and compelling two carriers subject to State control to enter into such agreement. Every objection that can be urged in one case can be urged with equal force in the other. If Congress has the right to give the Interstate Commerce Commission jurisdiction over joint rates voluntarily established, it has also the right to compel the establishment of such rates in a proper case, and we have no doubt that if the act of Congress contained such a provision it would have been sustained.

This case comes directly within the decision last quoted, as the joint rate had been established between the carrier and was in force at the time the commission entered upon its investigation.

The claim by the apellant or plaintiff in error that a joint rate which is less than the sum of the two local rates constitutes discrimination is disposed of by the case of

Railway Company vs. Olson, 10 U. S. App. 430.

In that case Olson sued to recover for claimed excess freight paid by him, basing his claim upon the ground that the railroad was carrying through freight for less than the price charged for local freight. It was held that that fact did not constitute unjust discrimination; also that a joint through rate might be less than the sum of the local rates.

II.

THE RAILROAD AND WAREHOUSE COMMISSION AND THE DISTRICT AND SUPREME COURTS OF MINNESOTA HAVE FULL JURISDICTION IN THE PREMISES, ALL THE REAL PARTIES IN INTEREST HAVING BEEN DULY MADE PARTIES.

In the 14th subdivision of the brief of counsel for plaintiff in error it is argued that the order of the Commission fixed rates over two roads, i. e., the Minneapolis, New Ulm & South-

western Railroad and the Wisconsin, Minnesota & Pacific Railroad, without having made those companies parties to the proceeding.

The first named, counsel admits, is owned and operated by the plaintiff in error, but claims the latter "is wholly independent." This statement, as to the present condition of those railroads is evidently a mistake, as the answer interposed by plaintiff in error in the district court to the alternative writ contains the following allegation, page 31, Record: "The Minneapolis & St. Louis Railroad Company is a common carrier operating a line of railroad from Minneapolis, Minnesota, to Angus, Iowa; it also owns and operates a line of railroad extending from Hopkins, Minnesota, on its first named line westerly through the State of Minnesota to Watertown, South Dakota. It owns and operates a branch line from Winthrop, on said last named line, to New Ulm, Minnesota. Said branch line was, prior to June 1st, 1899, owned by the Minneapolis, New Ulm & Southwestern Railroad Company, all the capital stock of which last named company was owned by this defendent. Said The Minneapolis & St. Louis Railroad Company has connections and traffic arrangements with other lines of railroad by which it has access to New York, Chicago and all the business centers of the United States, and is engaged in both interstate and local traffic."

Mr. Nay testified, on the hearing, that the Minneapolis & St. Louis Railroad Company began to treat the Minneapolis, New Ulm & Southwestern as a part of its system March 1st, 1899 (Record, page 47), and that the ownership of the Wisconsin, Minnesota & Pacific was acquired by plainitff in error, February 20th, 1899 (Record, page 51).

We think it is apparent from all the evidence that both of these roads claimed now to be independent have, at least from a period antedating the issuance of the alternative writ, been and still are operated and owned by the plaintiff in error, and constitute a part of its system.

There is no claim that the Commission had not proceeded regularly, and had not acquired full jurisdiction over the plaintiff in error. No objection, therefore, can be taken by the plaintiff in error to the order upon the ground of want of jurisdiction, and the order of the Commission is binding upon

it as to shipments destined from points upon its line even though it acquired the ownership of the road connecting with such points after the making of the order.

But this claim of the plaintiff in error will not be considered for the reason that it is not contained within any of the assignments of error in this court or in the supreme court of Minnesota. The seventh and ninth assignments here, under which this claim is made, have no reference to any defect of parties in the hearing before the Commission or elsewhere.

Deitsch vs. Wiggins, 15 Wall. 539;
Scholey vs. Rees, 23 id. 331.

If there is any force at all in the objection it must be upon the ground that the Commission had not jurisdiction to make the order sought to be enforced, because it had failed to properly bring before it all the carriers to be affected. A carrier not a party to the proceeding would doubtless be heard to raise this objection whenever it was sought to enforce the order, but even in that case the objection would have to be made at the first opportunity, or it would be held to have been waived. No other party would be heard to make the objection at any time unless it appeared that such party's rights were imperiled, and it would then be in the nature of an objection to the proceeding upon the ground of a defect of parties. In the Minnesota practice, a defect of parties, plaintiff or defendant, is a ground of demurrer. General Statutes 1894, section 5232. And unless objection is taken either by demurrer or answer the defendant is deemed to have waived the same. General Statutes 1894, section 5235.

Blakeley vs. La Duc, 22 Minn. 477;
Davis vs. Chouteau, 22 Minn. 548.

III.

THE RATE FIXED BY THE COMMISSION IS REASONABLE, AND THE DIVISION MADE IS FAIR AND JUST.

There is nothing in the contention of the plaintiff in error that the trial court failed to find the facts in favor of the Commission.

Chapter 91, of the laws of Minnesota, 1895, provides, section 3, subdivision C, second paragraph, as follows:

"The rates established by said Commission shall go into effect within ten (10) days after the same are promulgated by said Commission, and from and after that time the schedule of rates so established shall be prima facie evidence in all the courts of this State that such rates are reasonable through rates for transportation of freight and cars upon the railroads for which such schedules shall have been fixed."

And subdivision D, of the same section, provides: " * * * And the division so determined by the Commission shall in all controversies or suits between the railroad companies interested be prima facie evidence of the just and reasonable division of such charges."

The findings of the Commission being prima facie correct, the burden was upon the carrier to prove that the rates fixed were unreasonable.

It must be remembered that the rates so declared to be prima facie correct are those fixed by the Commission after a hearing upon due notice to the carrier, in which all the requirements necessary to constitute due process of law are complied with.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Minnesota, 134 U. S. 418.

The trial court, that is, the district court of Minnesota, found that the plaintiff in error failed to overcome the presumption as to the correctness of the rate fixed by the Commission. The fact that the Court said in its memorandum that the contention of the plaintiff in error might be true, but its evidence failed to show that to be the fact, does not lessen the force of the findings made. It is well settled that the memorandum filed by the Court is no part of its findings, and can neither add to nor take away from their force.

Morrow vs. St. Paul City Railway Company, 65 Minn. 382.

The language used by the Court in its memorandum, however, amounts to a finding that the plaintiff in error had failed to overcome the presumption which exists in favor of the findings of the Commission.

This is not a case where the Court has failed to make findings, and therefore is not within the decision in case of Railway Co. vs. Board of Railway Commissioners, Supreme Court Reports, volume 20, page 236. If the findings of the Court were not sufficiently specific, the proper practice would have been to request additional findings.

Cummings vs. Rogers, 36 Minn. 317;
Opinion of supreme court of Minnesota in this case.

The burden was upon the plaintiff in error in the court below to show by competent evidence that the rate determined was reasonable, and if, as we claim, no evidence was introduced from which it could be determined what was or was not a reasonable rate, it follows, of course, that the judgment of the district court was properly sustained by the supreme court of the State. The mere fact that the plaintiff in error introduced evidence upon some theory of its own, does not entitled it to a decision in its favor; and it was not incumbent upon the State, nor would it have been good practice, for it to introduce evidence when the railway company, upon whom the burden rested, entirely failed to make out a case.

Counsel for the plaintiff in error makes the mistake of constantly stating that claims made by the company were conceded, when, as a matter of fact, they were either ignored, or accepted merely for the purpose of showing that even upon such theory the judgment must be for the State.

The rate fixed by the Commission being presumed to be correct, such presumption must be rebutted and overcome by competent evidence. Evidence of bonded indebtedness and of the amount of the capital stock only is not sufficient, for while it is proper to show the bonded indebtedness, the amount and value of stock, the capital invested in the road, the rate of interest which its bonds bear, and the operating expenses,—the real inquiry is the fair and reasonable value of the property engaged and used in the business of the carrier; and this, together with its operating and other necessary expenses, is taken as the basis upon which rates can be computed.

Dowe vs. Beidelman, 125 U. S. 680;
Smythe vs. Ames, 169 U. S. 466.

In the latter case this court said, at page 544: "But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations and declare a dividend to stockholders."

It is apparent that no evidence was introduced by the plaintiff in error which would justify the trial court in reversing the findings of the Commission, and it became the duty of that court to find, as it did, that the rates established were fair and reasonable. It was in the power of the plaintiff in error, had it seen fit, to introduce evidence in accordance with the decisions of this Court, but it evidently preferred not to.

IV.

THE TESTIMONY NOT ONLY FAILS TO OVERCOME THE PRESUMPTION IN FAVOR OF THE FINDINGS OF THE COMMISSION, BUT, WE SUBMIT, DEMONSTRATES THAT THE RATES ESTABLISHED BY THE COMMISSION ARE LIBERAL, AT LEAST AS TO THE PLAINTIFF IN ERROR.

The rate is made upon hard coal in car load lots only. It is important that this be borne in mind, for if we understand counsel's position, it is that the carrier would be compelled to perform the service at a loss if the rate fixed by the Commission were maintained. It may be conceded, as a general proposition, that carrying local freight hauled for short distances and in broken or small lots, requiring considerable handling, care, etc., is more expensive per ton per mile than what is designated "through freight." But this does not mean interstate business. There is no expense or economy attached to crossing a state line. A distribution of freight in small quantities to intermediate points from a station fifty miles east to a station fifty miles west of the line dividing Minnesota and Dakota would be just as expensive as though the whole line were in either state. The character of the commodity and the method of handling it are the chief considerations.

Mr. Hopkins, the general freight agent of the plaintiff in error, explained this with great fairness in his testimony. The first great classification is in car lots and less than car lots (page 80, Record). Then come various other considerations, such as value, the perishable quality of the goods, the size and shape of the package, the work of handling, etc., (pages 87-92, Record). The fact being that coal is placed in one of the lowest classes, that is Class D (page 91, Record), and only such articles as sand, bricks, hay and salt can be classed lower. This shows that whatever may be said as to through or local freight in general, coal in car load lots, whether through or local, can be transported for the minimum rate, and particularly is this true of the coal subject to the rate fixed by the Commission, it being delivered on cars to the Minneapolis & St. Louis Railway Company upon their tracks at Minneapolis. (Hopkins' testimony, page 89.)

We shall, therefore, for the purpose of this argument, disregard the comparison which Mr. Hopkins makes (page 75) between the cost of handling through and local freight, and consider the reasonableness of the rate in view of the general earnings of the road, and the average cost of carrying freight, according to the statements made by Mr. Nay.

Mr. Nay, the auditor of plaintiff in error, testified to the earnings of the Minneapolis & St. Louis Railroad Company, freight and passenger, for the fiscal year ending June 30th, 1899, as well as the operating expenses for the same year. And the computations made by Mr. Yapp, offered in evidence by the State, were based upon the statements furnished by Mr. Nay.

Mr. Nay's estimate as to the cost of carrying freight must be rejected, as he includes in the cost interest upon the bonded debt and dividends upon stock (Record, page 60 et seq.). Counsel seems to misunderstand our position in this matter. We claim that the evidence sustains the findings of the Commission, conceding that the carrier has a right to earn sufficient to pay its operating expenses, interest upon its bonds and reasonable dividends upon its stock,—that is, reasonable dividends in view of all the circumstances of the case; but we also insist that interest upon bonded indebtedness and dividends are not part of operating expenses, nor should they be so de-

scribed, and that it is misleading and confusing to include those items under the head of operating expenses.

Mr. Yapp, the witness for the State, made certain computations, and prepared the tables hereafter referred to, as we have said, from the testimony of Mr. Nay. He properly confined operating expenses to such items as are properly so termed, but included under that term taxes and rentals paid by the carrier. The tables prepared by Mr. Yapp and received in evidence are as follows:

EXHIBIT 1.

STATEMENT showing COST OF OPERATION, GROSS EARNINGS, and AVERAGE COST OF OPERATION PER TON PER MILE, for YEAR ENDING JUNE 30th, 1899, taken from FIGURES FURNISHED by the MINNEAPOLIS AND ST. LOUIS RAILROAD COMPANY.

	ST. PAUL DIV'N	WESTERN DIV'N	PACIFIC DIV'N	NEW ULM DIV'N	ALBERT LEA DIV'N	SOUTHERN DIV'N	TOTALS
Operating Expenses	$ 92,650.53	$219,266.13	$153,728.99	$29,384.87	$ 708,395.33	$350,882.85	$1,554,308.70
Taxes paid	1,813.23	19,120.82	10,318.75	399.77	38,448.30	22,043.14	92,144.01
Rentals paid	54,254.18				1,440.00		55,694.18
Total operating expenses	$148,717.94	$238,386.95	$164,047.74	$29,784.64	$ 748,283.63	$372,925.99	$1,702,146.89
DEDUCT							
Trackage and Rentals rec'd	13,099.80				135,488.55	3,120.00	151,708.35
NET COST	$135,618.14	$238,386.95	$164,047.74	$29,784.64	$ 612,795.08	$369,805.99	$1,550,438.54
Gross Earnings	$ 57,351.42	$603,554.72	$264,921.44	$33,884.10	$1,219,163.70	$532,469.51	$2,711,344.89
Freight Earnings	41,310.22	475,771.83	203,006.92	21,715.19	906,939.68	376,755.98	2,025,499.82
Per ct. of frt. to gross earnings	72.03%	78.83%	76.63%	64.09%	74.39%	70.76%	Av. 74.70%
Proportion of cost of operating charge to freight	$ 97,685.75	$187,920.43	$125,709.78	$19,088.97	$ 455,858.26	$261,674.72	$1,158,177.59
Total Tons one mile	1,941,846	26,901,460	9,414,681	675,831	89,524,755	34,797,490	163,256,063
Average cost per ton per mile	5.031	.6986	1.335	2.825	.5092	.7520	.7094

YEARS	1890	1891	1892	1893	1894	1895	1896	1897	1898	1899
Estimated cost per ton per mile in Minnesota	.684	.671	.695	.680	.....	.....	Not shown	.....	.....	.....
" " " " " " whole line	.727	.743	.736	.709	.....	.....	Not shown	.....	.....	.....
Average rec'pts " " " " in Minnesota	1.338	1.398	1.492	1.313	1.233	1.338	1.315	1.303	1.194	1.220
" " " " " " whole line	1.430	1.406	1.486	1.330	1.267	1.332	1.328	1.283	1.171	1.190

New Ulm Rate Case, Sept. 21st, 1899.

EXHIBIT 2.

STATEMENT showing COST OF OPERATION, GROSS EARNINGS, and AVERAGE COST OF OPERATION PER TON PER MILE for YEAR ENDING JUNE 30TH, 1899, taken from FIGURES FURNISHED by the MINNEAPOLIS AND ST. LOUIS R. R. COMPANY.

	WESTERN DIVISION	PACIFIC DIVISION	NEW ULM DIVISION	TOTALS
Operating Expenses	$219,266.13	$153,728.99	$29,384.87	$402,379.99
Taxes Paid	19,120.82	10,318.75	399.77	29,839.34
Rentals Paid				
Total Operating Expenses	$238,386.95	$164,047.74	$29,784.64	$432,219.33
Gross Earnings	$603,554.72	$264,921.44	$33,884.10	$902.360.26
Freight Earnings	475,771.83	203,006.92	21,715.19	700,493.94
Per Cent of Freight to Gross Earnings	78.83%	76.63%	64.09%	Avg. 77.63%
Proportion of Cost of Operation Chargeable to Freight	$187,920.43	$125,709.78	$19,088.97	$335,531.86
Total Tons One Mile	26,901,460	9,414,681	675,831	36,991,972
Average Cost per Ton per Mile	.6986	1.335	2.825	.907

EXHIBIT 3.

STATEMENT showing MILEAGE, RATES and RATES PER TON PER MILE, BASED ON RATES made by R. R. & W. H. COMMISSION IN NEW ULM.

COAL RATE CASE.

FROM DULUTH TO	MILEAGE FROM		RATES PER TON 2000 LBS. FROM DULUTH		M. & ST. L. PROPORTION	
	DULUTH	M'PLS	Old Rate	Comm.s' Rate	Rate per Ton	Rate per ton per mile
			$	$	$	Cts.
Hopkins	171	9	1.75	1.32	.32	3.556
Minnetonka M	174	12	2.00	1.35	.35	2.917
Deephaven	177	15	2.00	1.38	.38	2.533
Excelsior	181	19	2.10	1.40	.40	2.105
Waconia	194	32	2.35	1.51	.51	1.594
Young America	201	39	2.45	1.56	.56	1.436
Norwood	202	40	2.50	1.57	.57	1.425
Hamburg	206	44	2.50	1.62	.62	1.410
Green Isle	210	48	2.50	1.63	.63	1.313
Arlington	217	55	2.50	1.68	.68	1.236
Gaylord	226	63	2.50	1.75	.75	1.190
Winthrop	232	70	2.50	1.80	.80	1.143
Lafayette	239	77	2.50	1.86	.86	1.117
Klossner	246	83	2.50	1.91	.91	1.096
New Ulm	251	89	2.50	1.95	.95	1.067
Gibbon	240	78	2.50	1.87	.87	1.115
Fairfax	249	87	2.50	1.96	.96	1.105
Franklin	257	95	2.50	2.01	1.01	1.063
Morton	263	101	2.50	2.05	1.05	1.040
Redwood	269	107	2.50	2.11	1.11	1.037
Delhi	275	113	2.50	2.15	1.15	1.018
Belview	280	118	2.50	2.21	1.21	1.025
Echo	285	123	2.50	2.23	1.23	1.000
Wood Lake	292	130	2.50	2.29	1.29	.992
Hanley Falls	297	135	2.50	2.33	1.33	.985
Hazel Run	303	141	2.50	2.38	1.38	.979
Clarkfield	308	146	2.50	2.42	1.42	.980
Boyd	316	153	2.50	2.48	1.48	.967
		2222			2478	

M. & ST. L. AVERAGE RATE PER TON PER MILE, 1.115 CENTS.

EXHIBIT 4.

STATEMENT showing TOTAL number of TONS of HARD COAL RECEIVED from DULUTH for YEAR ending JUNE 30TH, 1899; M. & ST. L. R. R. PROPORTION of REVENUE and AVERAGE RATE PER TON PER MILE; also LOSS OF REVENUE, had COMMISSIONERS' RATES been in effect.

FROM DULUTH TO	MILES FROM MPLS.	TONS CARRIED	M.&ST.L. PROP'N OF RATE PER TON	TONS ONE MILE	REVENUE	RATE PER TON PER MILE
			$		$	Cts.
Green Isle	48	20	.63	960	12.60	1.312
Gaylord	63	99	.75	6,237	74.25	1.190
Winthrop	70	642	.80	44,940	513.60	1.143
Lafayette	77	15	.86	1,155	12.90	1.117
New Ulm	89	1154	.95	102,706	1,096.30	1.067
Gibbon	78	27.5	.87	2,145	23.93	1.115
Fairfax	87	218	.96	18,966	209.28	1.103
Franklin	95	31	1.01	2,945	31.31	1.063
Morton	101	71	1.05	7,171	74.55	1.040
Redwood	107	15	1.11	1,605	16.65	1.037
Echo	123	51	1.23	6,273	62.73	1.000
Wood Lake	130	47.5	1.29	6,175	61 28	.993
Hazel Run	141	18	1.38	2,538	24.84	.979
Clarkfield.	146	116	1.42	16,936	164 72	.973
Boyd	153	58	1.48	8,874	85.84	.967
					$	Cts.
Totals		2583		229,626	2,464.78	1.073 Av.

TOTAL TONS of HARD COAL received from DULUTH for YEAR ending JUNE 30TH, 1899, . . 2,583 tons.

M. & ST. L. R. R. proporton ON OLD RATE, 2,583 tons @ $1.50, ... $3,874.50

Had COMMISSIONERS' RATES been in effect for SAME PERIOD, M. & ST. L. R. R., PROPORTION WOULD BE, ... $2,464.78

LOSS OF REVENUE TO M. & ST. L. R. R. for year $1,409.72

EXHIBIT 5

STATEMENT showing MILEAGE RATES and RATES PER TON PER MILE on HARD COAL from DULUTH to STATIONS on GREAT NORTHERN and NORTHERN PACIFIC RY'S.

GREAT NORTHERN RY.				NORTHERN PACIFIC RY.			
TO	MILES	RATE PER TON	RATE PER TON PER MILE	TO	MILES	RATE PER TON	RATE PER TON PER MILE
Nickerson.....	33	1.25	3.787	Sawyer.....	38	.80	2.105
Kerrick	40	"	3.125	Corona	44	.90	2.045
Bruno	48	"	2.604	Cromwell....	50	.95	1.900
Partridge.....	56	"	2.232	Wright	56	1.00	1.786
Sandstone	63	"	1.984	Tomahawk...	62	1.10	1.774
Brook Park...	80	"	1.562	McGregor ...	71	1.20	1.690
Mora.....	91	"	1.374	Kimberley...	81	1.20	1.481
Tosca	106	"	1.179	Rossburg....	85	1.25	1.471
Milaca.....	111	"	1.126	Aitkin.....	91	1.25	1.374
Bridgman	114	1.60	1.403	Cedar Lake..	96	1.30	1.354
Oak Park.....	120	"	1.333	Deerwood....	101	1.40	1.386
Foley	125	"	1.280	Jonesville ...	111	1.45	1.306
St. Cloud	139	"	1.151	Brainerd.....	118	1.50	1.271
Collegeville...	149	2.00	1.342	Baxter.....	123	1.55	1.260
Avon.	155	"	1.290	Sylvan Lake.	128	1.60	1.250
Albany	161	"	1.242	Pillager	132	1.65	1.250
Freeport	167	"	1.197	Motley	140	1.75	1.250
Melrose	173	"	1.156	Staples.....	148	1.85	1.250
Sauk Centre ..	181	"	1.104	Downer Lake	150	1.85	1.233
West Union...	189	"	1.058	Aldrich.....	155	1.90	1.226
Osakis.....	195	"	1.026	Verndale	159	1.95	1.226
Nelson.....	201	"	.995	Wadena.....	165	2.00	1.212
Alexandria....	206	"	.971	New Y'k Mills	178	2.15	1.208
Brandon.....	219	"	.913	Perham	189	2.25	1.190
Evansville....	224	2.05	.915	Luce	194	"	1.160
Melby	228	2.10	.921	Frazee.....	200	"	1.125
Ashby.....	233	2.15	.923	McHugh	205	"	1.098
Parkdale.....	247	2.25	.911	Detroit	210	"	1.071
Fergus Falls..	252	"	.893	Audubon	217	"	1.037
Carlisle.....	260	"	.865	Lake Park ..	222	"	1.014
Rothsay	268	"	.839	Winnipeg Jct.	230	"	.978
Lawndale.....	275	"	.818	Hitterdal	236	"	.953
Barnesville....	282	"	.798	Syre.....	259	"	.900
Downer.....	290	"	.776	Gary.....	264	"	.852
Glyndon	300	"	.750	Fertile.....	276	"	.815
Averill.....	306	"	.735	Tilden.....	287	"	.784
Felton..... ..	314	"	.717	Red Lake F'lls	310	"	.726
	6601	68.45	1.037 Avg.		5772	65.05	1.127 Avg.

Mr. Yapp's computations show the following:

	Cents.
Average rate per ton per mile at Commission's rate, Exhibit 3	1.115
Average cost per ton per mile on whole system, Exhibit 1	.7094
Average cost on Western Pacific & New Ulm, per ton per mile, Exhibit 2	.907

That is, that the rate allowed by the Commission for handling coal in car load lots, received on through shipments from Duluth, is nearly thirty per cent above the average cost of carrying freight on the whole system, and nearly twenty per cent above the cost upon the three divisions affected by the order. A rate which allows from twenty to thirty per cent of gross income as profit cannot be claimed to be unreasonable.

The false basis on which Mr. Nay estimates the cost of carrying freight is further shown in the table shown at Exhibit 1, in which the cost for several years past is taken from the annual reports made by the plaintiff in error, in none of which the cost approaches the amount now claimed.

According to the report of the Minneapolis & St. Louis Railway Company for the fiscal year ending June 30th, 1899, the actual receipts per ton per mile for freight carried by that road were as follows:

	Cents.
In Minnesota, Exhibit 1	1.220
On entire system, Exhibit 1	1.190
As we have said, the Commission's rate for hard coal in car load lots was	1.115
While the old rate charged for this service was	1.784

The actual earnings for the carriage of freight during the year were	$1,860,257.57
If the rate fixed by the Commission for hard coal, to-wit, 1.115 cents, were applied to all classes of freight, it would have yielded a revenue of	1,743,632.68
Or a total reduction in revenue of	$116,624.89

If, however, the former rate on hard coal, charged by the Minneapolis & St. Louis Ry. Co., were applied to all the freight carried, the total earnings for freight would have been...	2,789,812.29
The actual earnings were	1,860,257.57
The increase would have been	$929,554.72

The contention of the respondent is that the old rate was fair and reasonable, and yet we find that if that rate were adopted as an average rate, the freight earnings of the road would have been increased about fifty per cent.

This showing cannot be disputed, and it absolutely disposes of the contention that the old rate was just or reasonable, because it shows that the rate fixed for hard coal must have been far above the average rate, although the classification of the article, to-wit, Class D, is far below the average.

There is, however, another method of testing the reasonableness of the rate fixed by the commission. At page 66, Record, Mr. Nay places the average cost per ton per mile of carrying freight at 1.112 cents. In the net cost Mr. Nay includes operating expenses, taxes, interest and dividends, and, so far as can be seen, every expenditure or disbursement made. This must be so, for at page 46 he places the total expenditures at $2,237,939.27

While at page 66 he says the net cost was..... 2,335,925.65

Thus making the net cost greater than the total expenditures by $97,986.38

Then, by dividing the proportion of this, which is chargeable to freight, by the number of tons carried one mile, he arrives at what he designates the average cost, to-wit, 1.112 cents. The average receipts per ton per mile on the entire road during 1899 were 1.190 cents, Exhibit 1.

We submit that what Mr. Nay designates as the net cost would in fact constitute an ample and sufficient revenue for the carriage of freight, as it allows operating expenses in full, interest on its bonded debt in full, and a dividend upon its stock; and we think this court would say, if it were called upon to pass upon that question, that schedules which would

yield an average return of 1.112 cents per ton per mile would be, at least as to the carrier, fair and reasonable.

If this is true, that an average rate of 1.112 cents would be reasonable, it could hardly be claimed that a rate of 1.115 cents upon hard coal in car load lots would be unreasonable, and if the test proposed by counsel was again made, and that schedule applied to the entire traffic, as suggested by counsel at page 50 Record, it would yield a revenue of $4,691.43 more than would the average rate of 1.112 cents; or, if Mr. Nay is correct, that the Commission's rate averaged 1.118 cents, it would increase the earnings $9,382.86 above the amount which would be earned at 1.112 cents.

Now, what does all this show? Simply that the rates on hard coal in car load lots were exhorbitant, that for some reason, which no one has tried to explain, a commodity which, under all the accepted rules governing freight rates, should be carried for a low rate, has been charged a high one, one far above the average, although its class was far below.

It cannot be claimed, therefore, that under the order of the Commission the plaintiff in error would be required to perform the services ordered at a loss. While, on the contrary, we submit that it does affirmatively appear that these particular services can be rendered at the rate provided for in the order of the Commission at a large profit.

The entire annual reduction which would be caused by the enforcement of the Commission's rates would be, according to the computations contained in Exhibit 4, $1,409.72, a very paltry sum when it is considered that the total freight earnings of the road were $2,025,499.82, and the total freight earnings on the three divisions affected by the order were $700,493.94.

But we do not rest this case upon the claim that where the reduction from total earnings is slight, that such fact justifies the rate. Our claim is that the testimony in this case establishes, as fully as it is possible to establish the correctness of a rate on a single commodity, that the rate ordered by the Commission is just and reasonable. This, of course, is a most perplexing question to determine, but it seems to us that it is fully determined in this case by the comparisons which we

have made with the total earnings, the average rate, and the returns received by the ralroad company from the old rates.

There may be some doubt as to the value of comparisons, but inasmuch as the plaintiff in error has made some, we may be permitted to do the same.

	Cents.
The rate per ton per mile which the Duluth road receives under this order, and which it is willing to accept, is	.625
Average rates to points on Great Northern, Exhibit 5..	1.037
Average rates to points on Northern Pacific, Exhibit 5..	1.127

Whenever competition is met, the rates go far below those fixed by the Commission. For instance, on shipments to some points the St. Paul & Duluth road accepted a rate of about one-half a cent per ton per mile. (Hopkins' testimony, Record pages 83-85.)

Instead, therefore, of overcoming the presumption in favor of the Commission's rate, the plaintiff in error proved that it, at least, had no cause for complaint.

The judgment should be affirmed.

W. B. DOUGLAS,
Attorney General, Minnesota.

THOS. D. O'BRIEN,
IRA B. MILLS,
Of Counsel.